

EXHIBIT A – AFFIDAVIT OF CHARLES J. HARDER

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

vs.

Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC
aka GAWKER MEDIA; GAWKER MEDIA
GROUP, INC. aka GAWKER MEDIA;
GAWKER ENTERTAINMENT, LLC;
GAWKER TECHNOLOGY, LLC; GAWKER
SALES, LLC; NICK DENTON; A.J.
DAULERIO; KATE BENNERT, and
BLOGWIRE HUNGARY SZELLEMI
ALKOTAST HASZNOSITO KFT aka
GAWKER MEDIA,

Defendants.

AFFIDAVIT OF CHARLES J. HARDER

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CHARLES J. HARDER, Esq. being duly sworn, deposes and says:

1. I am a resident of Los Angeles, California over the age of 18 years. I am an attorney duly licensed to practice before all courts of the State of California, among other courts. I am a partner at the law firm Harder Mirell & Abrams LLP, counsel (admitted *pro hac vice*) for Plaintiff Terry Gene Bollea, professionally known as Hulk Hogan. The statements made herein are based on my personal knowledge.

2. Attached hereto as **Exhibit A** is a true copy of my February 4, 2014 email correspondence with Alia Smith, counsel for Gawker Media, LLC (“Gawker”).

3. Attached hereto as **Exhibit B** are true copies of excerpts from the deposition transcript of Mr. Bollea’s March 6–7, 2014 deposition.

4. Attached hereto as **Exhibit C** is a true copy of an excerpt from Gawker’s January 4, 2013 Dispositive Motion, noticed for hearing April 23, 2104.

5. Each of the publicly available documents marked at the Gawker deponents’ depositions were collected after the deadline for production of documents responsive to Gawker’s document requests. Specifically, Mr. Bollea produced responsive documents on August 28, 2013. Each of the publicly available documents marked at the Gawker depositions were collected on or after September 26, 2013, which was one month after Mr. Bollea’s production.

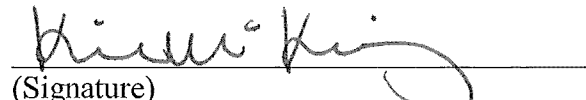
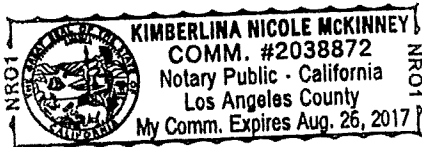
I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Executed this 4th day of April, 2014.



CHARLES J. HARDER

Sworn to and subscribed before me this 4th day of April, 2014 by Charles J. Harder who is personally known to me or _____ who has produced _____ (type of I.D.) as identification (check one).



Kimberlina McKinney
(Type or Print Name)

Notary Public
My Commission Expires: 8/26/2017
Commission No.: 2038872

EXHIBIT A

From: Alia Smith <ASmith@lskslaw.com>
Sent: Friday, February 07, 2014 7:24 AM
To: Charles Harder
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: RE: Bollea v. Gawker, Clem

I don't think any good purpose would be served by continuing this exchange, as I believe our position is clear. I would, however, call your attention to Florida Rule of Judicial Administration 2.514(b).

Alia

Alia L. Smith

 LEVINE SULLIVAN
KOCH & SCHULZ, LLP
(202) 508-1125 | Phone

From: Charles Harder [mailto:charder@hmafirm.com]
Sent: Thursday, February 06, 2014 6:51 PM
To: Alia Smith
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: RE: Bollea v. Gawker, Clem

Alia: Documents that you acquire, as counsel acting for your clients, are within the legal control of your clients and therefore must be produced. Unless you produce your responsive documents on the original due date, I will object to the introduction of all such documents at the time of the deposition. I calculate Feb. 27 being the due date – 30 days after service of the Supplemental Document Requests. Your obvious intent of sandbagging by client at his deposition are improper and will be addressed at the time of the depositions.

Charles

From: Alia Smith [mailto:ASmith@lskslaw.com]
Sent: Thursday, February 06, 2014 3:23 PM
To: Charles Harder
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: RE: Bollea v. Gawker, Clem

Charles,

Thank you for agreeing to the extension.

As for your other point, we do not anticipate using any documents that either Gawker or A.J. Daulerio created or received since the last production. We do reserve the right to use documents that we as their counsel have gathered in preparing our case – i.e., our work product, particularly those documents that are equally available to the plaintiff. Indeed, your partner Doug Mirrell did just that at the depositions of Gawker's witnesses, when he asked about a number of documents that plaintiff's counsel gathered, that were not produced before the depositions, and that were subsequently produced in a supplemental production AFTER the depositions.

In addition, your assertion that our responses would otherwise be due to be served on February 27 is incorrect. The due date prior to your extension was March 4, after Bubba Clem's deposition and only two days before your client's, such that even without an extension there is no requirement that you receive the documents before plaintiff's deposition.

In light of the foregoing, there is no reasonable argument that Gawker is precluded from asking these key witnesses questions about documents we have gathered. We expect that you will not choose to disrupt depositions that took months to schedule – and for which we are collectively paying a special discovery magistrate to preside over – on this basis. To the extent you elect to proceed otherwise, we must obviously reserve all rights. Thank you.

Best,
Alia

Alia L. Smith



(202) 508-1125 | Phone

From: Charles Harder [<mailto:charder@hmafirm.com>]
Sent: Wednesday, February 05, 2014 4:53 PM
To: Alia Smith
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: RE: Bollea v. Gawker, Clem

Alia:

I will give your clients an extension until March 20, but your office and Gregg's office cannot use at the March 2-7 depositions any documents responsive to the Supplemental Document Requests (that is, after-acquired documents responsive to our prior document requests) unless you produce the documents by Feb. 27 (30 days after service of the supplemental document requests). This is to ensure that there is full and fair disclosure of responsive documents *prior to* questioning witnesses, at the time of their depositions. I will object to the use of any documents at deposition that have not been produced to all parties in advance of the depositions (ie, by Feb. 27). This assumes, of course, that the documents used are responsive to the earlier document requests propounded by Bollea to Gawker Media LLC and Daulerio.



CHARLES J. HARDER
CHarder@HMAfirm.com
(424) 203-1600

From: Alia Smith [<mailto:ASmith@lskslaw.com>]
Sent: Wednesday, February 05, 2014 1:18 PM
To: Charles Harder
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: RE: Bollea v. Gawker, Clem

Charles,

We have repeatedly extended deadlines for you on discovery, including on the most recent set which comprised only a few requests for production and a few interrogatories. You have asked us to supplement a total of 200 requests (116 for Gawker and 84 for Daulerio), and, especially given the upcoming depositions, we need a brief extension to respond for

such a large number of requests. While we do not believe we would be required to produce any documents themselves on the due date in any event (as was the case, for example, with plaintiff's initial document production), we thought it better to coordinate an agreed-upon date with you. In addition, we cannot see how any documents of GAWKER's or DAULERIO's since the initial responses (if any) would be relevant to the depositions of PLAINTIFF or the CLEMS.

We think our request for a brief extension is reasonable and, consistent with the Court's guidelines about professional courtesy among counsel, ask you to reconsider. Thank you.

Best,
Alia

Alia L. Smith

 LEVINE SULLIVAN
KOCH & SCHULZ, LLP
(202) 508-1125 | Phone

From: Charles Harder [mailto:charder@hmfarm.com]
Sent: Tuesday, February 04, 2014 4:26 PM
To: Alia Smith
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: RE: Bollea v. Gawker, Clem

Regarding the document requests, I assume that you are referring to the First Supplemental Document Requests – asking Gawker and Daulerio to produce their later-acquired documents. I would think that such documents could be located and produced within 30 days of the date of service of the requests. In any event, the documents are relevant to the depositions in early March. Thus, we would prefer to have these documents produced prior to the depositions. Thank you.

From: Charles Harder
Sent: Tuesday, February 04, 2014 11:51 AM
To: 'Alia Smith'
Cc: 'Seth Berlin'; 'gthomas@tlolawfirm.com'
Subject: RE: Bollea v. Gawker, Clem

For #3: I would like Judge Case's recommendation to reflect that the parties have 10 days to file with the Court an objection to the recommendation. The proposed order should not be filed until 10 days after the date of the recommendation.

For #1: I will check the requests and current deadline. Given that we have a week of depositions the first week of March, I was hoping to get document production before the depositions, but I will check the specific requests to see if the documents are expected to yield information pertinent to any of the depositions schedule for early March.

For #2: I am checking, and will let you know.

From: Alia Smith [mailto:ASmith@lskslaw.com]
Sent: Tuesday, February 04, 2014 11:44 AM
To: Charles Harder
Cc: Seth Berlin; gthomas@tlolawfirm.com
Subject: Bollea v. Gawker, Clem

Charles,

A few housekeeping items:

(1) Would you please give Gawker and Mr. Daulerio a brief extension – until March 20 – to respond to the most recent set of document requests?

(2) Please let me know whether plaintiff will agree to hold his deposition in Tampa, so that we may send out amended deposition notices.

(3) Please let us know your comments on the draft proposed report and recommendation and order on Gawker's motion to compel the FBI records release that I circulated on Friday.

Thank you very much.

Best,
Alia

Alia L. Smith



1899 L Street, NW
Suite 200
Washington, DC 20036
(202) 508-1125 | Phone
(202) 861-9888 | Fax
www.lskslaw.com

EXHIBIT B

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY

TERRY GENE BOLLEA, professionally
known as HULK HOGAN,

Plaintiff,

No. 12-012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC,
aka GAWKER MEDIA, et al.,

Defendants.
-----/

VOLUME 2

CONTINUED VIDEOTAPED

DEPOSITION OF: TERRY GENE BOLLEA

DATE: March 6, 2014

TIME: 1:58 p.m. to 5:47 p.m.

PLACE: Riesdorff Reporting Group
601 Cleveland Street
Suite 600
Clearwater, Florida

PURSUANT TO: Notice by counsel for
Defendants for purposes of
discovery, use at trial or
such other purposes as are
permitted under the Florida
Rules of Civil Procedure

REPORTED BY: Susan C. Riesdorff, RPR, CRR
Notary Public, State of
Florida

Pages 155 - 311

1 (Exhibit No. 80 marked for identification.)

2 MR. BERLIN: This one we're missing the --
3 okay. We are missing the disks for this, but we
4 will bring them in tomorrow and give them out.

5 MR. SAFIER: This is complete, what we're
6 showing you.

7 MR. BERLIN: This is the complete thing. And
8 then what we'll do -- the witness has just turned
9 the computer sideways. You can look forward and
10 then everybody else can watch the monitor.

11 Let me just make sure that -- Charles, have
12 you got enough room to put the TV screen --

13 MR. GOLD: Did you guys say what it is we're
14 watching yet?

15 MR. BERLIN: No.

16 MR. HARDER: I'd also like to -- I'd like to
17 make an objection for the record. There are a lot
18 of exhibits that are being provided that were
19 never produced in discovery. I've never --
20 they've never produced any of this, and we asked
21 back in probably June for them to produce
22 documents that are responsive. And then we also
23 did a request for supplemental responses so that
24 everything that they have acquired since the first
25 one that they would produce. And the deadline

1 came and went, and they didn't give us any of
2 these things. So I just -- we object to the
3 admissibility of any of these things.

4 MR. BERLIN: If I may just respond on the
5 record, the requests that Mr. Harder is referring
6 to were served and are due -- we actually served
7 objections on Tuesday, but after an extension
8 aren't due until -- for a couple weeks. But we
9 also believe that we're not required to disclose
10 in discovery our work product, including exhibits
11 that we may or may not use in deposition, and
12 have so -- and have objected on that basis.

13 And for what it's worth, when our witnesses
14 were deposed in late October and early -- late
15 September and early October in New York, there
16 were a number of exhibits that we had requested in
17 discovery that were not provided until after the
18 depositions, and our witnesses answered questions
19 about them without objection. So --

20 MR. HARDER: I would like to respond to this,
21 though. Because when I gave you an extension of
22 time to produce things, I said, if you're going to
23 surprise my witness with them at his deposition,
24 we are going to object to the admissibility of
25 these things. I said, if you want to have these

1 things be admissible, you need to give them to us
2 in advance, because we got our document request in
3 on time so that 30 days later, you would be able
4 to provide us prior to his deposition. You didn't
5 give me any of these things. You obviously were
6 holding them. You wanted to surprise him at his
7 deposition. So we're objecting to the
8 admissibility of all of these things.

9 As far as whatever happened back when, I
10 don't -- I don't know the timeline of events. If
11 you ever want to get into that, we can get into
12 that. You didn't make any objections and you
13 still haven't. So perhaps you're not interested
14 in --

15 MR. BERLIN: That's because I don't believe
16 that your work product is discoverable and I don't
17 believe mine is discoverable. We have served
18 objections. Those objections were served timely
19 on Tuesday. If you would like to file a motion,
20 you're certainly free to do so. You have not
21 filed any sort of motion. And so at this point,
22 there's no basis for the objection and we're going
23 to proceed.

24 MR. HARDER: And I just -- I am going to file
25 a motion because this is the first time that I'm

1 seeing these things. And we -- we intend to file
2 a motion. But I think that -- and this is not
3 work product. This is a piece of evidence that I
4 asked you for that you didn't give me until today
5 to surprise my witness with it. Same with this,
6 same with all of this stuff.

7 And it's interesting, Seth, that you make
8 such a big deal out of allegations that we don't
9 provide full and complete everything way in
10 advance, and yet you surprise my witness with them
11 at his deposition.

12 MR. BERLIN: I haven't made any allegations
13 that you've not provided anything full in advance.

14 MR. HARDER: Okay. Well, I'm glad we
15 clarified that.

16 MR. BERLIN: Specifically -- but for what
17 it's worth, we've had hearing after hearing in
18 this case where you've basically said emphatically
19 that you will not produce anything that's equally
20 publicly available to us and have not done so.
21 And these things are all publicly available, an
22 article in the Tampa Bay Tribune for what's coming
23 next, which you'll see is something that I don't
24 think is going to be in any way unfair surprise to
25 your client. And we have asked your client if

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

TERRY GENE BOLLEA,
professionally known as HULK
HOGAN,

Plaintiff,

Case No.

12-012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC, aka GAWKER MEDIA, et
al.,

Defendants.

CONTINUED
VIDEOTAPED

DEPOSITION OF: TERRY GENE BOLLEA

DATE: March 7, 2014

TIME: 1:50 p.m. to 5:55 p.m.

PLACE: Riesdorff Reporting Group
601 Cleveland Street
Suite 600
Clearwater, Florida

PURSUANT TO: Notice by counsel for Defendants
for purposes of discovery, use at
trial or such other purposes as
are permitted under the Florida
Rules of Civil Procedure

REPORTED BY: Aaron T. Perkins, RPR
Notary Public, State of
Florida at Large

Volume 4
Pages 452 to 623

1 THE WITNESS: Thank you.

2 THE VIDEOGRAPHER: Off the record at 5:20.

3 (A recess was taken.)

4 THE VIDEOGRAPHER: On the record at 5:24.

5 THE WITNESS: Still under oath.

6 MR. HARDER: I'm just going to reiterate what
7 we -- something we discussed yesterday, which is
8 that a lot of these things are responsive to our
9 discovery. They were never provided to me in
10 advance, and so we are reserving the right to
11 bring a preclusion order as to all this evidence
12 that you're surprising my witness with. I know
13 that you have a different way of viewing it.

14 MR. BERLIN: I will stand on what I said
15 yesterday on the record about that and won't
16 belabor the point.

17 BY MR. BERLIN:

18 Q. Once again, we are going to play you an
19 excerpt from a broadcast of Bubba Clem's radio show.

20 THE WITNESS: Is it something you've seen or
21 had, or is this another surprise?

22 MR. HARDER: Probably another surprise.

23 THE WITNESS: Okay.

24 (Whereupon, an audio clip was played as
25 follows:)

EXHIBIT C

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally
known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA, et al.,

Defendants.

NOTICE OF FILING FEDERAL COURT PLEADINGS FROM THIS ACTION

COMES NOW Defendant, GAWKER MEDIA, LLC and hereby files the following pleadings. These pleadings were timely filed in this action while this case was removed to the Middle District of Florida, where it was captioned *Bollea v. Clem*, Case No. 8:13-cv-0001 (M.D. Fla.), but were not transferred to this court when the case was remanded.

1. Defendant Gawker Media, LLC's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim (Dkt. 10, initially filed 1/04/2013).
2. Defendant Gawker Media, LLC's Notice of Constitutional Challenge to Florida Statute § 934.10 (Dkt. 11, initially filed 1/04/2013).
3. Plaintiff's Response to Defendant's [Gawker Media, LLC's] Motion to Dismiss (Dkt. 21, initially filed 1/22/2013).
4. Defendant Heather Cole's Motion to Dismiss First Amended Complaint (Dkt. 22, initially filed 1/25/2013).
5. Plaintiff's Response to Defendant's [Heather Clem's] Motion to Dismiss (Dkt. 25, initially filed 2/08/2013).

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Gregg D. Thomas

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

601 South Boulevard

P.O. Box 2602 (33601)

Tampa, FL 33606

Telephone: (813) 984-3060

Facsimile: (813) 984-3070

gthomas@tlolawfirm.com

rfugate@tlolawfirm.com

Of Counsel:

Seth D. Berlin (*pro hac vice* motion forthcoming)

Paul J. Safier (*pro hac vice* motion forthcoming)

LEVINE SULLIVAN KOCH & SCHULZ, LLP

1899 L Street, NW, Suite 200

Washington, DC 20036

Telephone: (202) 508-1122

Facsimile: (202) 861-9888

sberlin@lkslaw.com

psafier@lkslaw.com

Counsel for Defendant

Gawker Media, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April 2013, I caused a true and correct copy of the foregoing to be served by mail and email upon the following counsel of record:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Christina K. Ramirez, Esq.
cramirez@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Harder Mirell & Abrams LLP
1801 Avenue of the Stars, Suite 1120
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines
mgaines@tampalawfirm.com
D. Keith Thomas
dkthomas@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ Gregg D. Thomas

Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRY GENE BOLLEA professionally
known as HULK HOGAN

Plaintiff,

Case No.: 8:13-cv-0001-T-26AEP

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA; GAWKER
MEDIA GROUP, INC. aka GAWKER
MEDIA; GAWKER ENTERTAINMET,
LLC; GAWKER TECHNOLOGY, LLC;
GAWKER SALES, LLC; NICK DENTON;
A.J. DAULERIO; KATE BENNERT AND
BLOGWIRE HUNGARY SZELLEMI
ALKOTAST HASZNOSITO KFT,

DISPOSITIVE MOTION

Defendants.

**DEFENDANT GAWKER MEDIA, LLC'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM**

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 3.01, by and through the undersigned counsel, defendants Gawker Media, LLC ("Gawker") hereby moves this Court for an order dismissing plaintiff's Complaint ("Complaint" or "Compl.") against it in its entirety for failure to state a claim upon which relief may be granted. As grounds for its motion, Gawker states as follows:

1. Plaintiff alleges various claims arising out of the publication on www.gawker.com of a report (the "Gawker Story") about a video of plaintiff, a well-known celebrity, cheating on his wife with the wife of his best friend with the friend's blessing (the "Video"), together with brief excerpts of the Video (the "Excerpts").

matter of law, that publisher did not violate right of publicity where defendants did not use plaintiff's name to directly promote a product or service); *Tyne*, 901 So. 2d at 809 (dismissing misappropriation claim for same reason); *Fuentes*, 721 F. Supp. 2d at 1260 (same where plaintiff could not allege that defendants "used his name and likeness to promote some other product or service"). As such, plaintiff's claim for common law misappropriation fails as a matter of law and should be dismissed with prejudice.¹⁷

D. Intentional Infliction of Emotional Distress (Sixth Cause of Action)

As discussed in Part I *supra*, the cause of action for intentional infliction of emotional distress ("IIED") is particularly disfavored in the First Amendment arena because of the likelihood that the tort might be used to punish disfavored speech. *See Snyder*, 131 S. Ct. at 1219; *Falwell*, 485 U.S. at 50-51. Even were his claim not constitutionally infirm, plaintiff has failed to state a claim for IIED, which plaintiff has previously conceded "'may be decided as a question of law.'" Dkt. 67 (Prior MTD Opp.) at 15-16 (citation omitted).

First, plaintiff has not pled *facts* that would, even if proven true, establish that that Gawker's conduct was "intentional or reckless" with respect to plaintiff's alleged emotional distress. *See Lockhart v. Steiner Mgmt. Servs., LLC*, 2011 WL 1743766, at *3 (S.D. Fla. May 6, 2011) (granting motion to dismiss because conclusory assertions that defendant engaged in "intentional misconduct designed and intended to cause . . . severe emotional distress" were insufficient to state a claim) (citation omitted). Plaintiff's sole factual contention in this regard is that Gawker refused plaintiff's requests not to publish and, later, to take down, the Excerpts. *See*

¹⁷ In *Bollea I*, plaintiff erroneously relied on authorities involving either commercial use or injury. *See* Dkt. 67 (Prior MTD Opp.) at 12-14 & n.9 (relying on *Gritzke v. M.R.A. Holding, LLC*, 2002 WL 32107540, *1 (N.D. Fla. Mar. 15, 2002) (misappropriation claim stated against seller of *Girls Gone Wild* videotape where plaintiff's image was used "on the package of defendant's videotape and in advertisements therefor"); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (entire commercial value of the plaintiff's act destroyed by defendants' broadcast of key portion, circumstances different than plaintiff's attempt here to punish and enjoin publication, not preserve its commercial value)).

Compl. ¶ 86. But publishers are regularly subjected to such requests, and plaintiff's theory would expose any publisher who stood on its right to publish to a claim for IIED. Moreover, where Gawker edited the more than 30-minute Video down to less than two minutes of Excerpts, and included only approximately nine seconds of sexually explicit footage – all in connection with a news report – such conduct is a far cry from the kind of conduct that Florida courts have found to qualify as intentionally or recklessly causing severe emotional distress. *See, e.g., Nims v. Harrison*, 768 So. 2d 1198, 1200-01 (Fla. 1st DCA 2000) (defendant threatened to kill teacher and rape her children in student newsletter); *Williams v. City of Minneola*, 575 So. 2d 683, 686 (Fla. 5th DCA 1991) (police officers viewed videotape of autopsy of man who died of an apparent drug overdose at officer's home in a "party atmosphere").

Second, plaintiff has not pleaded facts that would establish "outrageous" conduct for purposes of his IIED claim. "In Florida, '[t]he issue of whether or not the activities of the defendant rise to the level of being extreme and outrageous . . . is a legal question in the first instance for the court to decide as a matter of law.'" *Vance v. S. Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1575 n.7 (11th Cir. 1993) (quoting *Baker v. Fla. Nat'l Bank*, 559 So. 2d 284, 287 (Fla. 4th DCA 1990)). Here, the publication of the Gawker Story and the Excerpts, including approximately nine seconds of footage of plaintiff engaged in sexual activity, hardly qualifies, especially in light of plaintiff's own public discussions of his sex life. *See Moore v. Wendy's Int'l, Inc.*, 1994 WL 874973, at *3-4 (M.D. Fla. Aug. 25, 1994) (granting motion to dismiss based on finding that, although allegations of extreme sexual harassment were "totally inexcusable and unacceptable," they did not qualify as "outrageous" conduct required to establish IIED). Moreover, because Gawker's conduct – posting a news report accompanied by excerpts – mirrored the conduct approved by the Court in *Michaels II*, it cannot as a matter of

law be outrageous. *See Toffoloni II*, 483 F. App'x at 563-64 (finding no evidence of intentional conduct to support award of punitive damages where defendants believed their use involved a matter of public concern). Accordingly, plaintiff's IIED claim should be dismissed for this reason as well. *See Nickerson v. HSNi, LLC*, 2011 WL 3584366, at *3 (M.D. Fla. Aug. 15, 2011) (dismissing IIED claim where conduct alleged, "while perhaps unlawful, [wa]s not sufficiently outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").

Finally, plaintiff has not pled facts that, if proven, would establish the publication caused him *severe* emotional distress. His Complaint pleads that "[a]s a proximate result of" defendants' conduct, he "has suffered substantial emotional distress, anxiety and worry." Compl. ¶ 89. But these conclusory assertions are insufficient to plead the sort of *severe* emotional distress required to pursue this cause of action. *See Nickerson*, 2011 WL 3584366, at *3 (granting motion to dismiss where conclusory allegations of emotional distress were insufficient to state IIED claim). *Cf. Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1254-55 (S.D. Fla. 2008) (plaintiff sufficiently demonstrated that torture of her son caused her severe emotional distress including "insomnia and constant nightmares since her son was imprisoned").¹⁸

¹⁸ To the extent plaintiff also now pleads injury to his "personal and professional reputation and career," Compl. ¶ 89, such a claim is barred by *Falwell*, which prohibits IIED claims arising out of speech, where such speech would not independently support a defamation claim, *see* 485 U.S. at 50-51. Here, because the speech was indisputably true – and therefore published without actual malice in the constitutional sense – any alleged injury to reputation may not be redressed through a claim for IIED. *Id.* *See also, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999) (in case of broadcast of indisputably true hidden camera footage, rejecting efforts "to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim" because "such an end-run around First Amendment stricture is foreclosed by" *Falwell*).

CONCLUSION

For the foregoing reasons, plaintiff's Complaint should be dismissed in its entirety as to Gawker (and each of the other Gawker Defendants).²¹

Respectfully submitted,

THOMAS & LOCICERO PL

By: /s/ Gregg D. Thomas

Gregg D. Thomas

Florida Bar No.: 223913

Rachel E. Fugate

Florida Bar No.: 0144029

400 North Ashley Drive, Suite 1100

P.O. Box 2602 (33601)

Tampa, FL 33602

Telephone: (813) 984-3060

Facsimile: (813) 984-3070

gthomas@tlolawfirm.com

rfugate@tlolawfirm.com

Of Counsel:

Seth D. Berlin (*pro hac vice* motion forthcoming)

Paul J. Safier (*pro hac vice* motion forthcoming)

LEVINE SULLIVAN KOCH & SCHULZ, LLP

1899 L Street, NW, Suite 200

Washington, DC 20036

Telephone: (202) 508-1122

Facsimile: (202) 861-9888

sberlin@lskslaw.com

psafier@lskslaw.com

Counsel for Defendant Gawker Media, LLC

²¹ Plaintiffs' claims against the other Gawker Defendants fail for the same reasons as set forth above. In addition, with respect to the other entities, plaintiff has not alleged any actionable conduct by them or conduct in or directed to Florida such that the Court would have jurisdiction over them. In the event that the other Gawker Defendants are ultimately served, it is anticipated that they would move to dismiss on both of those grounds as well, as they did in *Bollea I*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January 2013, a true and correct copy of the foregoing is being electronically filed and will be furnished via CM/ECF to:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Christina K. Ramirez, Esq.
cramirez@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

Counsel for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
D. Keith Thomas
dkthomas@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Counsel for Defendant Heather Clem

and served by mail and email on:

Charles J. Harder, Esq.
charder@HMAfirm.com
Harder Mirell & Abrams LLP
1801 Avenue of the Stars, Suite 1120
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Co-Counsel for Plaintiff

Michael W. Gaines
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Co-Counsel for Defendant Heather Clem

/s/ Gregg D. Thomas
Attorney